SUNRISE CONSTRUCTION CO.

IBLA 82-756 Decided May 26, 1983

Appeal from decision of Wyoming State Director, Bureau of Land Management, determining damages for sand and gravel trespass. WY-043-4-536.

Referred for hearing.

1. Hearings -- Trespass: Generally

> Where the Bureau of Land Management has assessed treble damages for a trespass occurring in connection with a contract for sale of sand and gravel and the purchaser offers to produce evidence to show that severance of material not included in the contract of sale was not grossly negligent, contrary to the finding by BLM, a hearing is ordered to afford the purchaser an opportunity to prove facts as claimed.

APPEARANCES: Vincent J. Horn, Jr., Esq., Cheyenne, Wyoming, appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Sunrise Construction Co. (Sunrise) appeals from a determination dated March 5, 1982, finding Sunrise to be liable to the United States for treble damages in the sum of $92,667.30 for sand and gravel removed by trespass in 1981. The decision appealed also found Sunrise had removed material now held in stockpiles by the United States, which appellant might purchase upon payment of an additional $44,104.50, a sum which also included a trebling of the appraised value of the stockpiled material.

On June 24, 1975, appellant entered into a contract with the Bureau of Land Management (BLM) for the purchase of sand and gravel from the public lands administered by BLM in the State of Wyoming, described as the SE 1/4 NE 1/4 sec. 32, T. 19 N., R. 108 W., 6th principal meridian. The contract initially provided for payment for the material removed at the rate of $.43 per cubic yard. A map of the area to be worked for sand and gravel was provided with the contract, showing the area from which material could be removed was staked with steel posts, and that the area to be excavated did not encompass all of the quarter-quarter section, since it comprised only a

total of 30 acres. The map shows that sec. 33 is the adjoining section and that between the area to be excavated and sec. 33 there is reserved in sec. 32 a buffer zone which is outside the staked area and not included within the terms of the contract. The exact extent of this buffer zone is not shown.

The contract between BLM and Sunrise further provides, at section 2, that: "Mineral material severed, extracted, or removed after termination of this contract, and prior to the termination of the period of liability under the bond, shall be deemed taken in trespass, and shall be charged to and he paid for by purchaser at triple the unit contract price therefor." This provision is modified by Sec. 5(c) of the standard provisions made part of the contract, which provides:

(c) For damage to materials for which Purchaser is chargeable under this section, it shall be required to pay triple the appraised value thereof as determined by the Authorized Officer, Provided, that if the Authorized Officer determines that the damage is not the result of willful action or gross negligence, may charge less than triple the appraised value of the mineral materials, but not less than the appraised value.

The proper application and effect of the proviso to section 5(c) raises the primary issue on appeal.

The record on appeal is a detailed account of the investigation by BLM into the trespass by Sunrise, which took place in the spring of 1981. Prior to the trespass, there had been only one transaction between the parties involving the sand and gravel contract; on January 29, 1979, Sunrise reported to BLM that 30,000 cubic yards of material had been removed under the contract, and paid the royalty due under the contract for that quantity in the amount of $12,900. The next activity was on February 26, 1981, when employees of BLM on a field inspection discovered that Sunrise equipment was operating in sec. 32 and possibly encroaching upon sec. 33, adjoining it to the east. The company equipment appeared to have crossed the staked area into the buffer zone between the sand and gravel contract area and sec. 33, according to reports by BLM employees.

On March 25, 1981, BLM employees met with officers of Sunrise concerning the suspected trespass in sec. 32. At the meeting, Sunrise was informed that gravel appeared to be under excavation by Sunrise equipment within the buffer zone in sec. 32. It was pointed out that the posts on the ground defined the area of the contract and were not the section line between sec. 32 and sec. 33. It was speculated that some material from sec. 33 had been removed. (Section 33 was privately owned by Rocky Mountain Energy with which, it developed, Sunrise had contracted to purchase gravel.) According to BLM records in this case the officers of Sunrise who were present at the March 25 meeting conceded that a trespass had occurred and that about 50,000 cubic yards of material had been removed. It was apparently further agreed that, to enable hauling to continue from the gravel pit, Sunrise would deposit $75,000 with BLM the following day. When, however, payment was not

made by April 3, 1981, BLM seized the gravel remaining in stockpiles at the excavation site. Sunrise now apparently disputes that the trespass occurred.

On April 23, 1981, another meeting took place between representatives of BLM and Sunrise. In a letter from BLM to Sunrise's attorney dated May 1, 1981, the results of the meeting on April 23 are summarized and Sunrise is afforded an opportunity to explain reasons why it should not be charged triple the appraised replacement value of the gravel. The letter dated May 1, 1981, states, pertinently:

> B. Sunrise will avail themselves of the opportunity to express a position on each of the four phases of alleged trespass. This position will include so much as is known of the quantity, the quality, the destination, and the source of material during each identifiable phase.
>
> C. Sunrise will avail themselves of the opportunity to express and expound on reasons, causes, and facts which may tend to prove the good faith and innocence of Sunrise during any or all phases of the alleged trespass.

In reply to this letter, Sunrise's attorney, by letter dated June 11, 1981, offered a summary of evidence to show that the trespass was innocent in support of an apparent contention that the material should be charged for at the appraised value under the proviso of section 5 of the contract of June 24, 1975. The Sunrise letter dated June 11, 1981, contains this statement:

> We were shown the BLM pit area in Section 32 by David Harned, BLM representative. The area was staked on the corners. We were told to very carefully preserve the East boundary line because it was the section line and if we went across it we would be on Rocky Mountain Energy Corporation land. We worked the gravel out of the pit area and then obtained a lease from Rock Springs Grazing Association and Rocky Mountain Energy in Section 33. Notice of this lease and extension of our permit with the Department of Environmental Quality were sent to the Bureau of Land Management as required by law. We then on January 28, 1981 began stripping the pit from the East line of the BLM pit onto Section 33. While we were working in this pit at a later time the BLM personnel came to the pit area. We approached them and asked them if there was a problem and were given no reason to think there was. Again at a later date, Carlton Lance came to our office and said that they thought we might be in the wrong pit. We showed him our documentation and assured him that it was our understanding that the East stakes were the section line. He said they were still checking and left the office.

Thus, the response by Sunrise offers to show that an employee of BLM had instructed Sunrise employees they could excavate to the stakes, which marked the line between sec. 32 and sec. 33. Inferentially, since Sunrise

had also contracted with the adjoining landowner in sec. 33 to purchase sand and gravel, it reasonably could, if the representation made by the BLM were true, continue to excavate to the east and enlarge the pit to include the private purchase which adjoined the public purchase made from BLM. There is no further evidence concerning this matter in the record. The reason for the existence of the buffer zone is not apparent.

Following this exchange with Sunrise, BLM continued its investigation into the extent of the trespass. Based upon a land survey, aerial photographs, and land records obtained from Sunrise and Sunrise customers, a determination was arrived at that the taking totaled 56,162 cubic yards. It is this figure upon which the calculation of amount due was made as to the $92,667.30 figure.

Sunrise, in its statement of reasons, seeks an evidentiary hearing to show that the alleged trespass was "unintentional" and asserts the existence of a factual dispute concerning the alleged trespass which can only be resolved by hearing before an administrative law judge of the Department. BLM has not responded, either to the statement of reasons or to the letter from Sunrise dated June 11, 1981, which outlines the expected testimony to be offered on the factual issue sought to be reviewed.

[1] It is obviously the contention of Sunrise that it was not grossly negligent when it excavated the buffer zone in sec. 32 to remove materials which it now appears it had not contracted for. It does not appear that Sunrise, when it offers to show that it was misinformed by BLM concerning the location of the section line, is seeking to show that it was entitled to rely upon that information, or that it was true, for erroneous advice of the sort described is not binding upon the Government. 1/ It does now appear, however, that this circumstance is one of the factual bases for Sunrise's argument that it was not grossly negligent when it removed the buffer zone in sec. 32. Sunrise also cites the existence of evidence to show apparent BLM uncertainty and lack of definitive notice as further indications that its action was not so unreasonable as characterized by BLM. 2/ Examination of the map attached to the sand and gravel contract indicates that the map is not drawn to scale to show the exact limits of the contract, although it does show that the boundary of the sale and the section line between sec. 32 and sec. 33 are not identical. Under the circumstances, the Board concludes that there remains an unresolved factual dispute concerning the action in this case which warrants a hearing. 3/

1/ See, e.g., George L. Hawkins, 66 IBLA 390 (1982)
2/ The Sunrise response of June 11, 1981, observes that: "We were never told to quit hauling from the piles until such time as they were posted."
3/ The existence of an unresolved factual dispute may warrant a hearing, which is a matter within the discretion of the Board to decide. 43 CFR 4.415. See Western Nuclear, Inc., 35 IBLA 146, 166, 167, 85 I.D. 129, 139, 140 (1978), rev'd on other grounds, 664 F.2d 234 (1981) and cases cited therein.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is referred to the Hearings Division for hearing and decision which will be a final decision for the Department unless further appealed to this Board. 4/

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge

4/ The question whether certain conduct may be characterized as "gross negligence" depends ultimately upon the facts proven at hearing. Cf. 65 C.J.S. Negligence §§ 1(2), 208, 289 (1966). Here, the burden is upon Sunrise to show that it is entitled to claim the benefit of the proviso to Section 5(c).